INHERENT PROPERTY RIGHTS, DEVISE AND DESCENT.

The obiter dictum utterances of some of our courts (mainly in inheritance tax cases), and those of some of our twentieth century statesman, on the subjects of vested property rights, and natural and inherent right to transmit property by devise or descent, have been given such wide publicity, and are so serious in their consequences, as to call on the thoughtful to think and protest against this tide of dangerous public sentiment. Such utterances are unsound and will return to plague their authors.

The question of what rights of property, if any, are natural and inherent, has been the subject of discussion by philosophers, jurists, and publicists for centuries, and, while they are not entirely in accord in their statement of abstract propositions, they are substantially in accord and agree, that civilization is based upon and recognizes their existence.

Property is defined to be the right and interest which man has in lands and chattels to the exclusion of others (Bouv.).

Webster defines property to be: "The exclusive right of possessing, enjoying and disposing of things; that to which a person has a legal title; an estate; that which is *inherent* in a subject or naturally essential to it; an attribute."

"Words and Phrases," Vol. 6, states: "The term 'property' has a most exclusive signification according to its legal definition, and consists of the free use, enjoyment and disposition by a person of all his acquisitions. It embraces not only the exclusive right to use it, but the right to dispose of it according to the will of the owner. In its broad sense, it embraces the right of dominion and possession, and there is no definition of property which does not include the power to dispose, and the right to transmit it follows as a natural sequence from the admission of the right itself. The unrestricted and exclusive right to dispose of the substance of a thing is an essential, inherent, element, attribute and part thereof, and is of its very essence."

Slaughter House Cases, 83 U. S. (16 Wall.) 127: "Property is everything which has an exchangeable value, and the

right of property includes the power to dispose of it according to the will of the owner, and labor is property."

Sir William Blackstone's Commentaries contain a most excellent, simple, and logical analysis of the law. Students of law, for many years, have been referred to it as a model, and as containing an excellent expression of the law.

It has been regarded as the proper basis for a good legal education, to which reference can always, with safety, be made for a statement of the common law. In Books 1, chapter 1, § 3, the author states: "The third absolute right, inherent in every Englishman, is that of property; which consists in the free use, enjoyment, and disposal of his acquisitions, without any control or diminution, save only by the laws of the land. The origin of private property is probably found in nature, but certainly the modifications under which we at present find it, the method of conserving it in the present owner and of translating it, are entirely, derived from society, and are some of those civil advantages, in exchange for which every individual has resigned a part of his natural liberty. The laws of England are, therefore, in point of honor and justice, extremely watchful in ascertaining and protecting this right. Upon this principle the Great Charter has declared that no freeman shall be disseized or divested of his freehold, but by the judgment of his peers or by the law of the land. It is enacted that no man's lands or goods shall be seized into the King's hands against the Great Charter and the law of the land; that no man shall be *disinherited* nor put out of his franchises or freehold, unless he be duly brought to answer, and be forejudged by a course of law, and if everything be done to the contrary, it shall be redressed and holden for none. So great moreover, is the regard of the law for private property, that it will not authorize the least violation of it; no, not even for the general good of the whole community."

So far as the above refers to ancient statutes they are but the enactment of what well-regulated society, either in a state of nature, or, coming out of it into civilization, required to promote its welfare. It was no part of the law of nature that society should remain in its nomadic and primitive condition. Density and increase of population was contemplated as a part

of the plan of creation, and the requirements of a dense population are no less natural than those of a sparse one.

Again, "Rights of Things," Book 2, Chapter 1, deals with questions of the right to territory which Sovereigns may acquire by discovery, and also, individual rights of property. The author recognizes the right and necessity, for the welfare of well regulated society, that the Sovereign possess the authority to grant his domain to his subjects; that, either by occupancy or by grant, the individual should have the right to acquire landed property; that the labor of a man's body and the work of his hands are his property by the laws of creation; that social justice is entitled to demand a contribution from the individual, at most, of only a moderate proportion of the fruits of his endeavor and possessions, and the amount thereof should be voluntary; "that the universal law of almost every nation (which is a kind of secondary law of nature), has either given a person dying, the power of continuing his property, by disposing of his possessions by will; or, in case he neglects to so dispose of it or is not permitted to make any disposition at all, the municipal law of the country then steps in, and declares who shall be the successor, or heir of the deceased; that is who, alone, shall have the right to enter upon this vacant possession in order to avoid the confusion which its becoming again common would occasion. The right of inheritance or descent to children and relations of the deceased seems to have been allowed much earlier than the right of devising by testament."

Again, man was given dominion over the earth, the fish of the sea, the fowls of the air, and every living thing that moved on the face of the earth.

It was certainly contemplated that he should have something more than mere occupancy or possession, and it was not a part of the plan of the Creator, as a law of nature, that man be in continuous warfare with his fellowman over material things, and the test of right should be measured by the strength of the contending claimants.

The inherent right of man to property is recognized in the Commandments: "Thou shalt not steal; thou shalt not covet thy neighbors' house, nor his ox nor his ass, nor anything that is thy neighbor's."

The unrestrained use, so far as is consistent with the requirements of well regulated society, the exclusive possession and the unlimited power of disposition and inheriting property, and are as clearly natural rights as the rights of life, liberty and happiness, and are not only natural but are inseparable from the very idea of property, and if these were taken away from it the term itself would have to be blotted out of existence.

The first recorded instance of the assertion of ownership over property is that of the Creator when he ejected Adam and Eve from the Garden of Eden for disobeying orders. When Noah and his family separated, each was reputed to have gone to a certain portion of the globe, so that each, and his descendants, might have an exclusive territory. Abraham and Lot, when their joint substance became so great that pastures and other conveniences grew scarce, got into trouble and a strife arose between their servants. Abraham settled this difficulty by suggesting to Lot that there be no strife between them; that Lot separate himself from him; that the whole land was before them, and if he would take the left hand that he, Abraham, would go to the right. This implies an acknowledgment of the right in either to occupy or acquire whatever lands he pleased which was not preoccupied by other tribes.

The rights of property must have existed in the days of Solomon or he could not have acquired the resources necessary to erect his temple, conduct his extensive domestic establishment and other occupations with which he is accredited.

The increase of the world's wealth during the past twenty years, due largely to the activities of the English and German people; the sacred regard of the Chinese for vested rights and contract obligations; the development, past and prospective, of South America; the great output of mines there and development of agriculture through the English and German capital and supervision, and, especially, the value of its mining productions, have astounded the world, adding to its intrinsic, inherent and indestructible wealth more than two hundred millions annually of gold, which, in fifty years, would be in excess of ten billions of dollars. The importance to all these countries, and our own, of a sound and correct conception of what the term property

embraces, and what are the elements which inhere in it as a part of its very essence, was never greater than now, and a misconception of them must needs lead to more serious consequences than ever before.

The English and German people attained, and could only have attained, their present world wide standing and influence by a proper conception of the elements of property, what inheres in and belongs to it as a part of its very nature, and a fair and just regard to the vested rights of property and the enforcement of obligations.

Many years ago, when Frederick the Great was constructing his far-famed "Sans Souci," he ran afoul the principle of the vested rights of property under the German law. He undertook to acquire the property of a German miller, which he desired for his establishment, and he was reminded by him that the same law which gave him his title to property and to the throne protected him, as a German subject, in the enjoyment of his mill seat, and he could not take it under the provisions of the German law. The Emperor tried it but failed to obtain it.

The existence of these elements is recognized by the laws of civilization and they are universal. The duty of a parent to make provision and care for those dependent on him is an obligation imposed not only by the moral code but by all other law, and the husband, during his life time, is required to maintain, support and provide for wife and children, and also, to the extent of his ability and within his means, it is held to be his duty to make provisions for their maintenance and support, and those in any wise dependent on him, after his death. This is not only human law but Divine law, and is recognized in what Paul wrote Timothy, "But if any provide not for his own, especially for those of his own house, he hath denied the Faith, and is worse than an infidel."

Sound public policy, in all ages, has favored the doctrine that "The laborer is worthy of his hire," and should be allowed to possess and enjoy the fruits of his industry. Industry and the acquisition of property, and, especially, homes, should be encouraged, and the individual should be permitted to acquire and possess a specific portion of land; that the individual who possesses industry and energy should be permitted to enjoy the

fruits thereof, and when he expends labor and some of his capital in a venture, such as even the boring of a hole in the ground or the development of a new country as a pioneer, whatever may be the results of his endeavor, be they large or small, he should be entitled to them as his exclusive property. Otherwise, in a great measure, the stimulus to exertion and industry would be taken away and he would relapse into a state of inertia and semi-barbarism.

This is the right of a natural person and is his personal right. He is at liberty to do or not to do as he pleases. This is one of his inherent rights. An artificial corporate body stands on a different footing. It is the creation of law, and it is not unreasonable that the creator of it should retain and preserve to itself, as is generally done, the right to supervise and regulate it, and see to it that this artificial body, of the State's creation, does not become oppressive or injurious to society. Vested rights in man to property, not only have existed for nearly all time, but, in the interest of welfare of society will continue to exist. Rights to property, beyond those of mere occupancy, possession and rights of possession, in one form or another, were the evolution of civilization, and the form in or instruments by which they were held changed as civilization developed, but, the mere fact that the instrument which recognized or preserved the rights of property was modified in form does not affect or impair their natural or inherent existence.

The statutes of descents are simply regulatory statutes, defining those who shall inherit and in what proportions. They all relate to the right of transmission which was recognized to have been in existence almost from the morning of creation. Regulating and defining the succession to property is a very different right from that of the right of the State to acquire it by escheat. The right to acquire by descent, and the right to make estamentary disposition of property, existed long prior to the enactment of statutes of inheritance or statutes of wills, and were in full force long before clerk and recording offices were brought into existence.

The modern doctrine of devise has changed the ancient one in many respects, so that it has now become almost unlimited or practically so; the form and requirements of it are merely

regulatory of an existing right, which should be held to be natural and inherent, and such statutes should be, like those on many other subjects, reasonable, and not such as are destructive of the right. When a supervisory or regulatory law, on any subject, is unreasonable, destructive or annihilatory of a right, it is and should be within the province of the courts, at all times, to declare it void.

When our governments, state and federal, were formed certain rights were named in and carefully safe-guarded, in the Declaration of Independence, the Constitutions of the United States, State of Virginia, and other States, and also in the Bill of Rights, etc. Among the things which were held to be self-evident, and with which all men were held to be endowed by their Creator, were certain inalienable rights, and among them were enumerated, life, liberty and the pursuit of happiness. This found expression in the Virginia Bill of Rights, which provides, "That all men by nature * * * * have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity, viz., the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness, etc., and further providing that no person shall be deprived of their property without due process of law."

Our Federal Constitution prohibits the taking of private property for public use without just compensation, and our State Constitution, and, perhaps, those of nearly all other states, prohibits the enactment of any law whereby private property shall be taken or damaged for public use, without just compensation. The courts have, over and again, held that private property of one citizen cannot, under any guise or on any pretense, be taken by or given to another person, either with or without compensation.

There are other Constitutional provisions of like nature, saving, guarding, protecting and securing life, liberty and the pursuit of happiness. We have eminent domain laws, and other laws in great number, designed to preserve and at the same time make our Constitutional provisions effective. These Constitutions are the act, and even more so, of the sovereign people,

than legislative enactment. Constitutional Conventions have always been composed of the most representative citizens of the Commonwealth, and these organic laws have been prescribed and adopted to protect the people from improper executive, legislative and judicial acts, and to protect the people themselves from themselves, and, especially when acting under sudden impulse. Certain rights are therein enumerated, as inherent and inalienable, with which all men are endowed by their Creator, and which, when they enter into society, they cannot by any compact, deprive or divest their posterity, namely, life, liberty and the means of acquiring and possessing property, and pursuing and obtaining happiness. If man was endowed by his Creator with these enumerated rights, and our Constitution makers certainly thought they were, and they are inherent and inalienable, and such as man, when he enters into society, cannot by any compact deprive or divest his posterity, it is clear they were and are the natural, inherent rights of man.

The Constitution does not create them or bring them into existence. They were in existence long prior to any written Constitution, and it is clear that, as to these enumerated rights, preexisting when the Constitution was adopted, it was adopted to preserve and continue them. Every Constitution contains provisions plainly providing for alteration, amendment and repeal.

Governments are constituted for governmental functions and purposes, and endowed with such powers, express or implied, as are reasonably necessary to their exercise, but these powers have heretofore been understood to embrace only governmental purposes and functions. What they were and what they are, is in part political and part judicial. When established, they have not heretofore been understood to invade what has been generally understood to be within the domain of individual private endeavor, or to embrace so much as to seriously menace and almost annihilate it. In other words, the province and object of government should be limited to governmental functions and purposes, and be so executed as not to annihilate and destroy individual enterprise and undertaking as distinguished from those which are fairly of a public nature.

In view of our century and a half of growth and prosperity,

which have astounded and been a marvel to the world, it is amazing that these great organic laws, since the dawn of the twentieth century, have been branded as worn out and not adapted to twentieth century conditions. Most of these utterances have come not from courts, but from aspirants for political favor and position, or Chatauqua spellbinders in search of something sensational, and to enable them to dispose of their lecture wares to applauding audiences at from $25 to $500 per hour.

Many of these addresses have been untrue to the facts of history, distorted and misrepresented the meaning of our Constitutional provision and organic laws, and the interpretation placed on them by the courts, which have heretofore been regarded as not only fair and reasonable, but doubts in respect to the validity of legislation generally, and almost universally, have been resolved in favor of their constitutional validity and have only been declared unconstitutional when clearly so.

The courts have saved the people from the consequences of legislation, and they have been unjustly and outrageously criticised as favoring plutocrats, when they decided principles in conformity with precedent and the Constitution. The courts have had to stand between the mob and law and order, time and again. They have had to protect by their ruling, life, liberty and property. They have had to enforce the organic principle, that man cannot by any compact deprive or divest himself or his posterity of self-evident, inherent or inalienable rights, with which he was endowed by his Creator.

They have been the one department of our government which has preserved inviolate, the fundamental principles on which it was founded, and, perhaps, it is not saying too much to claim that the continuance of its very organic existence is mainly due to the firm adherence of this department of our government to the principles on which it was founded. The courts of our land have been towers of strength, "which stood four square to every wind that blew." Our growth in numbers and resources has amazed and been the admiration of the world. Notwithstanding all our achievements, it is claimed what we have had is fundamentally wrong and our Constitution and organic laws are worn out.

It is proposed, not by repeal and amendment to change, but largely through interpretation, to place an entirely new and different meaning on them from that which has been generally accepted as correct. They are denounced as not adapted to present conditions. While it is true, "New occasions teach new duties and time makes ancient good uncouth," we may well pause in our career, bordering on madness, to ascertain whether ancient good is uncouth, and also what, if any, are the new duties which new occasions are imposing on us.

It may be well to think seriously over what is proposed, and what is heralded as progression, as a matter of fact, may turn out to be retrogression, or the new panaceas proposed may fall far short of being a good remedy for old diseases. An initiative and referendum ticket, fourteen inches wide and seven feet long, in the hands of an electorate, a considerable part of which cannot read or are foreigners, unacquainted with our form of government, may be safer than a Legislative Assembly or a Constitutional Convention, to deal with questions of public policy or make organic laws for a people. But time will probably prove this to be an iridescent dream, and a monumental, expensive mistake, unless human experience reverses itself, and wisdom ceases to be considered, "The principal thing, therefore get wisdom."

Again, the nostrum of judicial review and recall is proposed as a substitute for those learned in the law to dispose of great questions, and by the vote of those who are as confessedly ignorant of constitutional principles as children; to put it in their power to determine Constitutional questions, and to wipe out of existence the precedents of legal construction and the learning of the ages. It is proposed to run the entire country largely as a charitable institution, and make the strong and successful guarantee the weak against their weakness, the improvident against their improvidence, and the foolish against their folly.

In a sense, we are confronted with new occasions, and we have in a manner new duties imposed on us. But what are they but a call to defend the teachings of experience and civilization; to see to it that the fortresses which hold within their enclosures the inherent and inalienable rights of man, with which he was endowed by his Creator, and which by no compact he can de-

prive himself or his posterity, be not captured or weakened. We should say to those who would destroy the Constitutional Temples of the Fathers as was said to those who were attempting to take Port Arthur, "If taken, they must be taken at the point of the bayonet."

We think it quite clear, on examination of the cases decided, but few, if any of them, involved the question whether man by nature is endowed with inherent rights of the character stated. No less a personage than our Vice-President, publically announced the right to inherit and the right to devise are not constitutional, and can be taken away at will. Our courts, in several inheritance tax cases, have stated propositions of like nature, which were obiter in all of them and not necessary to their decision.

In Magoun *v.* The Illinois Trust and Savings Bank, 170 U. S. 283, it was held that an inheritance tax is not a tax on property but one on succession. McKenna, in this case, states: "The right to take property by devise or descent, is the creature of the law and not a natural right and privilege, and, therefore, the authority which confers it, may impose conditions upon it."

In the matter of Delano, 176 N. Y., a tax case, the court used even stronger language, when it said: "The privilege to make a will is not a natural or inherent right, but one which the state can grant or withhold in its discretion."

The case of Pullen *v.* Commissioners, 66 N. C. 361 (tax case 1872), the court, p. 363, says: "The right to give or take property is not one of those natural or inalienable rights which are supposed to precede all government and which no government can rightfully impair. Property itself, as well as the succession to it, is the creature of positive law." Page 364: "There was a time, at least as to gift by will, it did not exist, and there may be a time again when it will seem wise and expedient to deny it. These are the uncontested powers of the Legislature upon which no article of the Constitution has laid its hands to impair. If the Legislature may destroy these rights, may it not regulate it?"

State *v.* Alston (1895), 94 Tenn. 674, opinion, 680: "The right of any person to succeed to property of a deceased person,

whether by will or inheritance, is the creature of statute law, and the manner in which it shall pass by no means a natural right. The tax is not a tax upon property but the right or privilege of acquiring by succession.

State *v.* Dalrymple (1889), 70th Md. 294, opinion 298: "Every State in the Union, in the absence of a Constitutional prohibition, has the authority to regulate by law the devolution and the distribution of an intestate's property, situated within the jurisdiction of that state, etc., to prescribe who shall, and who shall not, be capable of taking it. It may prescribe conditions and limitations not forbidden by organic law or in conflict therewith."

Minot *v.* Winthrop (1894), 162 Mass. 113. This is an inheritance tax case which holds p. 117, opinion. "The descent or devolution of property, on the death of the owner in England, and in this country, has always been regulated by law." This case holds that a legacy comes under and within the meaning of the word, "commodity" of the Constitution of Massachusetts, and will be quoted further in this article.

Another case of the same character, is that of our own court, Eyre *v.* Jacobs, 14 Gratt. 422, in which the opinion is even in broader terms perhaps, than any of the above cases.

Mr. Marshall, in his address, April, 1913, to the National Democratic Club, evidently, when he stated, "The right to inherit and the right to devise, are not Constitutional and can be taken away," was attempting to give expression to what the above cases had decided, and he made it without examining them. Had he done so, he would have found all these utterances were made in inheritance tax cases, and the whole brood of them is misleading, and what is stated as to devise and inheritance is obiter dictum.

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(TO BE CONTINUED.)